Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-934

RICHARD LAWRENCE AND NICHOLAS BARNES,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO AND THE CITY OF CHICAGO,
Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

MOTION OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO TO DISMISS OR AFFIRM.

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Pursuant to Rule 16 this motion to dismiss or affirm is filed on behalf of the Board of Education of the City of Chicago, appellee.

The appeal presents no substantial federal question. The exercise of control over school land in Illinois, which the Illinois Trial, Appellate and Supreme Courts have here sustained, is well within the "plenary and exclusive" powers of the state which this court has previously upheld in cases coming from other states. Appellants' attacks on the Board of Education's determination of the leasehold rental for the subject property during the years 1970-1974 not only are frivolous but are based on gross distortion of the facts. Equally frivolous

is appellants' claim of conflict with the Ordinance of 1787 and the Illinois Enabling Act—a claim which, moreover, was neither properly raised nor expressly passed on by the courts of Illinois. In addition, the judgment of the Appellate Court rests on adequate state grounds and there is no state statute alleged to be in conflict with a federal constitutional or statutory provision. Accordingly, plenary consideration of the case by this court is not warranted.

STATEMENT.

This is an appeal from the decision of the Appellate Court of Illinois (appellants' petition for leave to appeal was denied by the Supreme Court of Illinois), affirming judgment for appellees entered by the Circuit Court of Cook County which found that appellants had failed to sustain their burden of proof.

The Board of Education has leased the subject property to the City of Chicago for municipal airport purposes since 1931. The lease expires in 1980. Data which was supplied to the Board disclosed that rents received from the City had been rising sharply under the existing rental formula (J. S., A6, 10), and the Board of Education approved continuing the same, promising basis of determining rent for the period 1970-1974. The Board had studied, discussed and carefully considered all available facts (J. S., A9, 13-14). It reached a business decision of a discretionary nature after considering the rise in rents occurring simultaneously with the City's efforts to revitalize the airport. The Board had the guidance and counsel of one of the most respected and knowledgeable real estate men in the Chicago area who recommended continuing the existing rental formula (J. S., A11). It acted in good faith with a view to maximizing long range benefits to the public schools and with knowledge of a mutually beneficial pattern of cooperation which exists with the City (J. S., A13-14). Accordingly, the Board adopted report 70-766-2 on August 26, 1970 (J. S., A1), approving the supplemental lease agreement with the City of Chicago. The existing provision in the lease for determining rents, which was based on ten percent of the City's gross revenue plus a fixed sum per year, was thus continued during the years 1970-1974.

The Board received a study of its real estate holdings in March, 1972 from Real Estate Research Corporation which had been employed for that purpose by the Board. That firm concluded that rental income under the existing formula, which the Board had carefully considered and approved, would continue to increase because the City's gross revenue from the airport was expected to increase (J. S., A10).

At the trial plaintiffs failed to introduce any evidence of fair cash market value of the subject property or evidence that it could be more profitably put to some other use. The trial court ruled that plaintiffs failed to sustain their burden of proof and entered judgment for appellees. The Appellate Court of Illinois affirmed the trial court judgment and held that the supplemental agreement continuing the existing rental formula was, under the facts in the record, a proper exercise of the Board's discretionary power pursuant to Illinois law.

On appeal to the Illinois Appellate Court and Supreme Court no federal statutory or constitutional issues were presented by appellants. (The issues presented to the Illinois Appellate Court by appellants herein are set out in Appendix.)

In their petition for leave to appeal to the Supreme Court of Illinois, appellant's brief contained no statement of issues. However, their brief contained the "Points for Reversal" set out in Appendix.

The opinions and orders of the state Courts do not mention, discuss or pass upon any federal question whatsoever (J. S., A4-15). Appellants filed no petition for rehearing in any Illinois court.

ARGUMENT.

I.

The Case Presents No Substantial Federal Question Warranting Review by This Court.

It is settled that the state, consistent with the Federal Constitution and law has "plenary and exclusive" power over school land granted by the early enabling acts of Congress such as that of Illinois. *Alabama* v. *Schmidt,* 232 U. S. 168, 169, 58 L. Ed. 555, 557, 558 (1914); *Cooper* v. *Roberts,* 59 U. S. (18 How.) 173, 181, 15 L. Ed. 338, 341 (1856); *Monaco* v. *Board of Education,* 77-1797 (CA 7, May 12, 1977; unpubl. order) cert. den., Supreme Court of the United States 77-5569, November 28, 1977. The opinion of the Court of Appeals is set out in Appendix hereto (A3-6). In *Alabama* v. *Schmidt,* this Court, held that legal title to section 16 school land had vested in the state "for a public purpose of which *that state is the sole guardian* and minister." (58 L. Ed. 558) Section 16 lands were granted to Alabama (3 U. S. Stat. at Large 489, 491, March 2, 1819) only 1 year after the Illinois Enabling Act. (3 U. S. Stat. at L. 428, ch. 67, April 18, 1818). The state sued to recover possession of section 16 land which defendant claimed by right of adverse possession under state statute. It was stipulated that the land still belonged to the state if defendant had not gotten title by adverse possession, which it was agreed defendant had, if the state statute, limiting suits like the one involved to twenty years, was valid as applied to section 16 school land. The trial court upheld defendant's title by adverse possession as authorized by the state statute. Judgment for defendant was affirmed by the Supreme Court of Alabama.

This Court affirmed and in an opinion written by Mr. Justice Holmes declared at pp. 557-558 (L. Ed.):

> "The above-mentioned act of Congress, under which Alabama became a state, provided that section 16 in every township 'shall be granted to the inhabitants of such township for the use of schools.'
>
> * * * * *
>
> "The argument for the plaintiff in error relies mainly upon *Northern P. R. Co.* v. *Townsend,* 190 U.S. 267, 47 L Ed. 1044, 23 Sup. Ct. Rep. 671, which held that a right of way over public land granted by the United States for railway purposes could not be extinguished by adverse possession under the statute of limitations of the state in which the land lay. The ground of that decision was that the grant to the railroad was not a coveyance of the land in fee simple absolute, but a limited grant 'on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.' . . . (citing cases) *But it does not apply to a gift to a state for a public purpose of which that state is the sole guardian and minister.* As long ago as 1856 it was decided 'the trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which *the power of the state is plenary and exclusive;*' and it was held that the state of Michigan could sell its school lands without the consent of Congress. *Cooper* v. *Roberts,* 18 How. 173, 15 L Ed. 338. This decision adverted to the fact that it had been usual for Congress to authorize the sale of lands if the state should desire it, but suggested that it was unnecessary (which indeed, followed from what was decided) and thus met the further argument here pressed that a qualified permission to sell was given to Alabama by a much later act of March 2, 1927, chap. 59, 4 Stat. at L. 237. It also disposes of other forms of the same contention, that the state law impairs the obligation of its contract, or involves a *breach of trust,* supposing that such positions are open to the state to take. *American Emigrant Co.* v. *Adams County,* 100 U.S. 61, 25 L. Ed. 563." (Emphasis added.)

The *Cooper* and *Alabama* cases hold that full legal title to section 16 land vested in the states upon the grants by early enabling Acts of Congress; that the states had "plenary and exclusive" power over school land trusts created by the early enabling acts; that the state was the sole guardian and minister

of the public purpose; and that federal law was not violated by state adverse possession statutes permitting total loss of section 16 school land granted to the state by the early acts.

The grant of school land by the Illinois Enabling Act on April 18, 1818, is practically identical to the grants to Michigan in 1836 and Alabama in 1819 involved in the *Cooper* and *Alabama* cases. The holdings of this Court in the above decisions that the power of the state over school land is "plenary and exclusive" applies equally to Illinois. The Illinois, Alabama and Michigan Enabling Acts were passed at about the same time. For this reason and because of the similarity of language in the three Federal Acts, Illinois has "plenary and exclusive power" over the subject property and no substantial federal question is presented in this case. In *County of Cook* v. *Calumet and Chicago Canal and Dock Co.*, 138 U. S. 635, 34 L. Ed. 1110, 1117 (1890) this Court said at p. 1117 (L. Ed.):

> "We have repeatedly held that the State had full power of disposition of the lands, and that the application of the proceeds to the purposes of the grant rested upon the good faith of the State, which might exercise its discretion as to their disposal." (Citing cases.)

The cases that appellants cite (J. S. 12), *Lassen* v. *Arizona*, 385 U. S. 458 (1967) and *Alamo Land and Cattle Co.* v. *Arizona*, 424 U. S. 295 (1976) are not in point. The facts involved and the Arizona-New Mexico Enabling Act construed in those cases both are patently different than the facts in the instant case and the school grant provision in the Illinois Enabling Act of April 18, 1818. *Lassen* involved the acquisition of interests in school land by the state admittedly without payment of any compensation whatsoever for the property taken. Unlike *Lassen*, there is no taking of any property without compensation in the instant case. On the contrary, the Board of Education owns the land, has not parted with it or any interest in it, and is assured under its lease, for which substantial rent is received, that at the expiration of the lease term just two years

away it will also own the improvements constructed on the land at lessee's expense. The Arizona-New Mexico Enabling Act, totally unlike that of Illinois, contained constraints on the leasing and disposal of school lands in those states. Explicit federal statutory restrictions in the nature of conditions were imposed on the power of Arizona and New Mexico over school land leasing and disposal. It was this Court's ". . . concern for the integrity of the conditions imposed by the Act, . . ." which compelled the holding in *Lassen* that the state violated the express provisions of the Arizona Enabling Act. See *Alamo Land and Cattle Co.* v. *Arizona*, 424 U. S. 295 at 302-303 (1976) for analysis of *Lassen*. As stated, no such statutory conditions were imposed in the Illinois Enabling Act. In the absence of restrictions in the Enabling Acts passed by Congress a century earlier such as those of Illinois, Michigan and Alabama, this Court has followed the settled rule that "plenary and exclusive power" over the school land trusts is in the state. See *Cooper* v. *Roberts*, 59 U. S. (18 How.) 173, 181 (1856), *Alabama* v. *Schmidt*, 232 U. S. 168, 169 (1914). There is no similarity between the 1818 Illinois Enabling Act grant of section 16 to the state and the grants to Arizona-New Mexico a century later. Appellants concede as much (J. S. 13). Moreover, there is no loss to the public schools in the instant case as there was in *Lassen* where school land interests were acquired without payment by the state of compensation for the property taken. On the contrary, the Board of Education acted to maximize benefits to the Chicago public schools (J. S. A. 13-14). Accordingly, no substantial federal question is presented in this case and plenary consideration of the appeal is not warranted.

II.

The Question Which Appellant Seeks to Have Reviewed Was Not Properly Raised or Expressly Passed on by the State Courts.

No federal constitutional or statutory issue was presented for review to the Appellate Court of Illinois and as a result no federal issue was mentioned, discussed or passed upon by the Appellate Court of Illinois. See opinion of the Appellate Court (J. S. A4, *et seq.*). The issues presented to the Illinois Appellate Court by appellants herein are set out in Appendix hereto.

No federal question was presented for review to the Supreme Court of Illinois in the appellants' petition for leave to appeal. Appellants' "points for reversal" in their brief in the Illinois Supreme Court—no issues were stated—are set out in Appendix hereto. Appellants filed no petition for rehearing in any Illinois Court.

The Appellate Court of Illinois in its decision did not mention, discuss or consider any federal question. Nor was a decision thereon necessary to a determination of the cause. The point was, that after extensive discovery and an exhaustive trial in the case, appellants were found to have failed to sustain their burden of proof. The decision of the trial court was primarily factual. The decision of the Appellate Court of Illinois affirming the judgment of the trial court in favor of appellees was based primarily on local law. Questions of fact and state law are not open to re-examination in this court. On the record, it is beyond doubt that the question sought to be reviewed is not before this Court. The statutory provision in 28 USC 1257(2) providing for review of a state court judgment denies jurisdiction to review federal issues raised for the first time in Supreme Court. *Cardinale* v. *State of Louisiana,* 394 U. S. 437, 438, 22 L. Ed. 2d 398, 400 (1969); *Fuller* v. *Oregon,* 417 U. S. 40, 50, n. 11, 40 L. Ed. 2d 642, 653 (1974).

In the case at bar Illinois' courts determined the questions raised, as was done by the state courts in *Cardinale* and *Fuller,* without consideration of any federal issue. Under the above decisions of this Court, we submit there is no jurisdiction of the appeal.

III.

The Opinion of the Illinois Appellate Court Shows That Its Judgment Rests on Adequate State Grounds.

Based on facts in the record, the Appellate Court correctly found the evidence established that the Board of Education considered all available information, and carefully deliberated with a view toward maximizing benefits to the Public Schools of Chicago from the lease of the subject property (J. S., A9, 14). The trial court was presented with essentially a factual dispute which it resolved in favor of defendants (J. S. A13). The Board of Education's leasing powers are derived from Illinois statutory authority (J. S., A14). The Appellate Court held, based on state law, that it was unable to substitute its judgment for the discretionary powers of the Board of Education over the leasing of school land where the record showed the Board was not arbitrary, acted in good faith and the trial court's judgment was not contrary to the manifest weight of the evidence. Under this Court's decisions, discretion as to disposal of school land is within the power of the state. *County of Cook* v. *Calumet and Chicago Canal and Dock Co.,* 138 U. S. 635, 34 L. Ed. 1110, 1117 (1890). Under circumstances such as exist in the instant case, where the state judgment rests on independent state grounds, this Court has consistently held there is no jurisdiction on appeal. *Durley* v. *Mayo,* 351 U. S. 277, 285, 100 L. Ed. 1178, 1185 (1956); *Stewbridge* v. *Georgia,* 343 U. S. 541, 547-548, 96 L. Ed. 1130, 1133-1134 (1952). Further, this Court has held that the sufficiency of evidence to support a state claim that has been tried in the state courts is a matter for decision in those courts. *American Radio Ass'n.* v. *Mobile Steamship Ass'n.,* 419 U. S. 215, 231, 42 L. Ed. 2d 399, 411 (1974).

IV.

There Is No State Statute, Ordinance or Regulation, Legislative in Character, Alleged to Be in Conflict with Federal Law.

The Board of Education report of August 26, 1970, of which appellants complain, was not at all legislative in character. Such Board action continued in force, during the years 1970-1974, an existing basis for determining rent to be paid by the City under the lease of the subject property. A school district's agreement as to the rental provision in a lease is not, we submit, a "statute" within the meaning of 28 USC 1257(2) and the Court lacks jurisdiction of the appeal under the statute.

CONCLUSION.

Based on the above authorities and for the foregoing reasons, the Board of Education of the City of Chicago respectfully moves the Court to dismiss the appeal taken herein or to affirm the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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RICHARD E. GIRARD,
Of Counsel.

APPENDIX.

The following issues were presented for review by appellants before the Illinois Appellate Court (P. 2 of appellant's brief before the Appellate Court of Illinois):

"ISSUES PRESENTED FOR REVIEW.

"A. The issue is whether the plaintiffs proved that the defendant Board of Education failed to discharge its duty as trustee to exercise judgment and care in the administration of the Midway Airport property.

"B. The issue is whether the plaintiffs proved that defendant Board of Education failed to discharge its duty as trustee to act with undivided loyalty with respect to the Midway Airport property.

"C. The issue is whether the plaintiffs proved that the defendant Board of Education failed to receive a fair rental for the Midway Airport property.

"D. The issue is whether the trial court erred in admitting certain evidence offered by the defendants respecting valuation of the Midway Airport property."

The following "points for reversal" were presented for review by Appellants before the Illinois Supreme Court (P. 2 of appellants' petition for leave to appeal to the Supreme Court of Illinois):

"POINTS FOR REVERSAL

"A. The Appelate Court Erred In Affirming The Trial Court's Holding That Plaintiffs Failed to Meet Their Burden Of Proof On The Issue Of Breach Of The Trust Duty Of Care.

"B. The Appellate Court Erred In Affirming The Trial Court's Holding That Plaintiffs Failed To Meet Their Burden Of Proof On The Issue Of Breach Of The Trust Duty Of Loyalty.

"C. The Appellate Court Erred In Affirming The Trial Court's Holding That Plaintiffs Failed To Meet Their Burden Of Proof On the Issue Of Breach Of The Trust Duty To Receive A Fair Rental For Trust Property.

"D. The Appellate Court Erred In Its Determination Of Plaintiffs' Burden Of Proof And In Concluding That The Trial Court Had Properly Resolved A Factual Dispute As To The Value Of The Midway Land In Favor Of The Defendants.

"E. The Appellate Court Improperly Considered Evidence Of Additional 'Benefits' Conferred By The City Upon The Board And Failed To Meet Plaintiffs' Contention That Such 'Benefits' Could Not Have Been Considered By The Trial Court".

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued February 18, 1977)
May 12, 1977

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

SHIRLEY MONACO, MARY CVACK, FRANCINE MACCHITELLI, *Plaintiffs-Appellants,*

No. 76-1797 *vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a Body Politic and Corporate, and JAMES F. REDMOND, General Superintendent of Schools of the Board of Education of the City of Chicago, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75 C 3115

William J. Lynch, Judge.

ORDER

In this taxpayers' action, plaintiffs challenge the defendant school board's expenditure of proceeds from the sale of common school lands for the renovation of school buildings, primarily on the ground that, under state and federal laws, the board is obliged to treat those proceeds as the corpus of a trust held for

the benefit of the schools. The District Court granted defendants' motion for summary judgment. On appeal, plaintiffs' numerous objections to the court's order fall into three general categories: challenges to the summary judgment procedure, arguments that the court misinterpreted the applicable federal statutes, and arguments that the board's action was also taken in violation of state law. We affirm.

First, plaintiffs misinterpret the purpose of a summary judgment motion. In this case the facts relevant to a determination of the federal question were undisputed: the school board admitted that it had sold the land in question without a referendum and that it used the proceeds therefrom for school renovation purposes. Thus the only issue that remained was whether the board's actions were contrary to the federal statutes granting the land to the state of Illinois. Such a purely legal issue is clearly a proper subject for adjudication on a summary judgment motion.

Second, the District Court's disposition of the federal question was correct. Plaintiffs' argument appears to be as follows: On its admission to the Union in 1818, Illinois was granted certain lands in each township "for the use of the inhabitants of such township for the use of schools." 3 Stat. 428. Illinois was thus made a trustee of the land for the benefit of its people with the direction to use the trust for school purposes. In 1843 Congress clarified the state's power as trustee by authorizing

> ". . . the sale and conveyance in fee simple, of all or any part of the lands heretofore reserved and appropriated by Congress for the use of the schools . . . and to invest the money arising from the sale thereof in some productive fund, the proceeds of which shall be forever applied, under the direction of [the Illinois] Legislature[ ], to the use and support of schools . . . and for no other use or purpose whatever: Provided, Said land, or any part thereof, shall in no wise be sold without the consent of the inhabitants of such township . . . to be obtained in such manner as the Legislature[ ] . . . shall by law direct."

5 Stat. 600. This statute also provided that the state could lease the land for a term not exceeding four years if that was the more productive course and could invest whatever income was derived from the land if that income in itself was insufficient to support the schools. Plaintiffs argue that the statute of 1843 marks the outer limits of the state's power with respect to common school land and that the board clearly exceeded those limits by selling land without a referendum and by spending, rather than investing, the proceeds from the sales.

Plaintiffs' interpretation of the statutes would be plausible were it not for two Supreme Court decisions, *Cooper* v. *Roberts*, 59 U. S. (18 How.) 173 (1856) and *Alabama* v. *Schmidt*, 232 U. S. 168 (1914), which hold that statutes similar to the 1818 grant gave the state "plenary and exclusive" power over the donated lands. As the District Court noted, it is hornbook property law that an absolute grant of property cannot be made conditional by action taken long after the gift has been completed. Accord, *Louisiana* v. *William T. Joyce Co.*, 261 F. 2d 128 (5th Cir. 1919).* Inasmuch as defendant obeyed the original 1818 command to use the land for school purposes, the District Court was correct in granting defendant's motion for summary judgment.

Finally, federal jurisdiction over plaintiffs' claims based on Illinois law depended on the court's jurisdiction over the federal question. When that question was resolved adversely to plaintiffs, before trial, it was proper for the District Court to dismiss

* Plaintiffs' assertion that this court "struck down" the precedents cited above in a prior appeal is based on their misunderstanding of a statement made at oral argument to the effect that these cases were not "conclusive" of the legal issues raised in plaintiffs' complaint. The two Supreme Court cases involved other statutes which, while similar, were not identical to the Illinois grant. The Fifth Circuit opinion did involve the same 1848 statute (as applied to Louisiana) but was of course not binding on us. On remand, however, these cases remained highly relevant and persuasive, especially in light of plaintiffs' failure to cite any legislative history or case law distinguishing the Illinois grant or impairing the Fifth Circuit's property-based analysis.

the entire action, leaving plaintiffs free to pursue their state law claims in the state courts. Wright, *Federal Courts* 74-75 (3d ed. 1976).

Accordingly, the District Court's order is AFFIRMED.